

No. 20-13695-B

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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PEOPLE FIRST OF ALABAMA, *et al.*,

*Plaintiffs-Appellees,*

v.

JOHN MERRILL, *in his official capacity as the Alabama Secretary of State,*  
*et al.*,

*Defendants-Appellants.*

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On appeal from the United States District Court  
for the Northern District of Alabama, Southern Division  
No. 2:20-cv-00619 – The Hon. Abdul K. Kallon

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**BRIEF OF OKLAHOMA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS,  
KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA,  
SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND TEXAS, *in support of*  
DEFENDANTS'-APPELLANTS' MOTION TO STAY INJUNCTION PENDING APPEAL**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 28-1, and 29-2, the *Amici* States certify that the below is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have in interest in the outcome of this appeal:

1. Abudu, Nancy G. – Counsel for Plaintiffs;
2. Agricola, Algert S. (Jr.) – Counsel for proposed Amicus Alabama Probate Judges Association (terminated);
3. Agricola, Barbara H. – Counsel for proposed Amicus Alabama Probate Judges Association (terminated);
4. Alabama Disabilities Advocacy Program – Counsel for Plaintiffs;
5. Alabama Probate Judges Association – Proposed Amicus (terminated);
6. Alabama State Conference of the NAACP – Plaintiff;
7. American Civil Liberties Union – Counsel for Plaintiffs;
8. American Civil Liberties Union of Alabama Foundation, Inc. – Counsel for Plaintiffs;
9. Anderson-Smith, Jacqueline – Defendant, Circuit Clerk of Jefferson County, Alabama;
10. Barger, Frank – Defendant (terminated);

11. Barnett, Alleen – Defendant, Absentee Election Coordinator of Mobile County, Alabama (terminated);
12. Bentley, Gregory – Plaintiff (terminated);
13. Bettis, Teresa – Plaintiff;
14. Black Voters Matters Capacity Building Institute – Plaintiff;
15. Bowdre, A. Barrett – Counsel for Appellants;
16. Brannon, Sarah – Counsel for Plaintiffs;
17. Brody, Stephen D. – Counsel for Plaintiffs;
18. Brom, Steven M – Counsel for Amicus Honest Elections Project;
19. Burks, Karen Dunn – Defendant, Deputy Circuit Clerk of the Bessemer Division of Jefferson County, Alabama;
20. Canupp, David J. – Counsel for Defendants Debra Kizer and Frank Barger;
21. Carroll, Donald McKinley – Counsel for Defendants Jacqueline Anderson-Smith and Karen Dunn Burks;
22. Clements, Fred Lee (Jr.) – Counsel for Defendants Ruby Jones Thomas, Johnnie Mae King, Lashandra Myrick, James Majors, Carolyn Davis-Posey, Bill English, and Britney Jones-Alexander;
23. Clopton, Robert – Plaintiff (terminated);

24. Cowell, John Mark – Counsel for Defendants Ruby Jones Thomas, Johnnie Mae King, Lashandra Myrick, James Majors, Carolyn Davis-Posey, Bill English, and Britney Jones-Alexander;
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28. Dungan, Aubrey Patrick – Counsel for Defendants Alleen Barnett and JoJo Schwarzauer;
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30. Engelhardt, Todd D. – Counsel for Defendants Alleen Barnett and JoJo Schwarzauer;
31. English, Bill – Defendant (terminated);
32. Essig, Brandon Keith – Counsel for Defendant Mary B. Roberson;
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36. Gallion, Thomas T. (III) – Counsel for Defendants Gina Jobe Ishman and J. C. Love;
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38. Green, Tyler R. – Counsel for Amicus Honest Elections Project;
39. Hale, Lee Louis – Counsel for Defendant Don Davis;
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45. Jones-Alexander, Britney – Defendant (terminated);
46. Kallon, Hon. Abdul K. – Judge for the Northern District of Alabama;
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49. Kizer, Debra – Defendant (terminated);
50. LaCour, Edmund G. – Counsel for Appellants;
51. Lance, Steven – Counsel for Plaintiffs;
52. Lawson, Theodore A. – Counsel for Defendants Jacqueline Anderson-Smith and Karen Dunn Burks;
53. Love, J. C. (III) – Defendant;
54. Majors, James – Defendant (terminated);

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59. Merrill, Hon. John H. – Alabama Secretary of State, Appellant;
60. Messick, Misty S. Fairbanks – Counsel for Appellants;
61. Myrick, LaShandra – Defendant (terminated);
62. NAACP Legal Defense & Educational Fund, Inc. – Counsel for Plaintiffs;
63. Naftel, James – Defendant;
64. Norris, Cameron Thomas – Counsel for Amicus Honest Elections Project;
65. Peebles, Eric – Plaintiff;
66. People First of Alabama – Plaintiff;
67. Porter, Howard (Jr.) – Plaintiff;
68. Reed, Mahogane D. – Counsel for Plaintiffs;
69. Rich, J. Jeffery – Counsel for Defendants Debra Kizer and Frank Barger;
70. Roberson, Mary B. – Defendant, Circuit Clerk of Lee County, Alabama (terminated);
71. Robson, Katrina – Counsel for Plaintiffs;
72. Rosborough, Davin – Counsel for Plaintiffs;

73. Ross, Deuel – Counsel for Plaintiffs;
74. Ross, Jay M. – Counsel for Defendants Alleen Barnett and JoJo Schwarzauer;
75. Ryan, Jenny – Counsel for Plaintiffs;
76. Schwarzauer, JoJo – Defendant;
77. Sewell, Robert – Counsel for Defendant Mary B. Roberson;
78. Short, Caren E. – Counsel for Plaintiffs;
79. Sinclair, Winfield J. – Counsel for Appellants;
80. Smith, Brenton Merrill – Counsel for Appellants;
81. Southern Poverty Law Center – Counsel for Plaintiffs;
82. Speegle, Jerome E. – Counsel for Defendant Don Davis;
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84. Thomas, Ruby Jones – Defendant (terminated);
85. Thomas-Lundborg, Alora – Counsel for Plaintiffs;
86. Thompson, Annie Carolyn – Plaintiff;
87. Thornton, Jerry L. – Counsel for Defendant Ruby Jones Thomas;
88. Threadgill-Matthews, Sheryl – Plaintiff;
89. United States of America;
90. Van Der Pol, William – Counsel for Plaintiffs;
91. Walker, Constance C. – Counsel for Defendants Gina Jobe Ishman and J. C. Love;

92. Webb, Kendrick E. – Counsel for Defendants Ruby Jones Thomas, Johnnie Mae King, Lashandra Myrick, James Majors, Carolyn Davis-Posey, Bill English, and Britney Jones-Alexander;
93. Weber, Jeremy S. – Counsel for Appellants;
94. Williams, Norbert H. – Counsel for Defendants Gina Jobe Ishman and J. C. Love;
95. Zampierin, Sara M. – Counsel for Plaintiffs (terminated);
96. Zaragoza, Liliana – Counsel for Plaintiffs

None of the *Amici* States have a parent corporation or a corporation that owns 10% or more of its stock.

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**STATEMENT OF THE ISSUE**

Should the district court’s injunction of Alabama’s absentee ballot verification requirements be stayed?

**INTERESTS OF *AMICI CURIAE* AND SUMMARY OF THE ARGUMENT<sup>1</sup>**

“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). Twelve other states, including some of the *amici* states, protect the integrity of absentee ballots through a verification requirement like the one Alabama uses.<sup>2</sup> Yet the district court, based on little more than a legislative disagreement on whether the COVID-19 pandemic renders the verification requirements inadvisable, enjoined these state laws as unconstitutional. The states have a compelling interest “in deterring and detecting voter fraud,” *Crawford*, 553 U.S. at 191, and COVID-19 does not diminish that interest or give district courts a license to engage in free-wheeling policy analysis of how to address that interest. Other courts have upheld similar ballot verification laws for that reason, as well as because absentee voting is the type of voting

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<sup>1</sup> As chief legal officers of their respective States, *amici* may file this brief without the consent of the parties or leave of the Court. Fed. R. App. P. 29(a)(2). Nonetheless, both parties have consented to the filing of an amicus brief.

<sup>2</sup> *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

most vulnerable to fraud. *Amici* also all share an interest in the standards that must be met before a federal court upends state election laws in the middle of an election. A stay is warranted to prevent last-minute judicial rewriting of state election laws, which can sow confusion, chaos, and uncertainty amid an already-tense election cycle.

### ARGUMENT

#### **I. Absentee ballot verification laws are constitutional, including during the COVID-19 pandemic.**

In 2005, a Commission chaired by former President Jimmy Carter and former Secretary of State James Baker concluded: “Absentee ballots remain the largest source of potential voter fraud.” Commission on Federal Election Reform, *Building Confidence in U.S. Elections* at 46 (Sept. 2005).<sup>3</sup> While “the most effective method of preventing election fraud may well be debatable,” *Cramford*, 553 U.S. at 196, “the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections,” *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam); see also *John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010) (states have “significant flexibility in implementing their own voting systems”); *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (“[T]he striking of the balance between

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<sup>3</sup><https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment”).

This is true because the Constitution makes it clear that it is for the states to prescribe “the Times, Places and Manner of holding Elections.” U.S. CONST. art. I, § 4; *see also Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (states have “broad powers to determine the conditions under which the right of suffrage may be exercised”). Failing to respect state constitutional prerogatives risks courts becoming “entangled, as overseers and micromanagers, in the minutiae of state election processes.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016).

The “propriety” of the state’s interest in “preventing election fraud” is “perfectly clear,” *Crawford*, 553 U.S. at 196, and here, Alabama’s chosen method to advance this interest in absentee ballots—notary or witness signatures, as well as a photo ID copy to request—undoubtedly make it harder to commit voter fraud, *see DCCC v. Ziriak*, 20CV211, 2020 WL 5569576, at \*13 (N.D. Okla. Sept. 17, 2020). Witnesses and notaries also help protect the most vulnerable voters by ensuring a neutral observer prevented them from being coerced. Meanwhile, the district court’s reduction of these requirements for ballot verification to a mere signature “gives no effect to the state’s substantial interest in combatting voter fraud.” *Democratic Nat’l Cmte v. Bostelmann*, Nos. 20-1538 *et al.*, 2020 WL 3619499, at \*2 (7th Cir. Apr. 3, 2020); *see also Ziriak*, 2020 WL 5569576, at \*13; *Democracy N.C. v. N.C. State Bd. Of Elections*, No. 20CV457, 2020 WL 4484063, at \*35-36 (M.D.N.C. Aug. 4, 2020).

States also have an interest in using ballot verification to *detect* fraud: a notary or witness who verifies a ballot can be questioned in cases where fraud is suspected, and finding a notary's or witness's name on one false affidavit can help in detecting other fraudulent ballots by finding other ballots that notary or witness signed. Such use of a witness requirement helped uncover extensive voter fraud in the overturned 2018 North Carolina Congressional race. *See Zirioux*, 2020 WL 5569576, at \*12-13.

Even in states where “voter fraud has in recent years been exceptionally rare,” that rarity “may well be due to the [state] voter identification requirements that have been in place for several years.” *Zirioux*, 2020 WL 5569576, at \*13. After all, the Supreme Court in *Cranford* upheld Indiana's in-person voter ID law based on the well-evidenced history of absentee voter fraud in other states. 553 U.S. at 194-96. If in-person voter ID is justified because of the history of absentee fraud, then absentee voter ID must be valid based on that same history. *Zirioux*, 2020 WL 5569576, at \*13.

The court below did not question the overall legitimacy of the state's verification laws, yet concluded that “some risk of COVID-19 exposure to voters” justifies extensive changes to Alabama's absentee verification laws. Op. 123. But “COVID-19 has not put any gloss on the Constitution's demand that States—not federal courts—are in charge of setting [election] rules.” *New Ga. Project v. Raffensperger*, No. 20-13360, slip op. at 10 (11th Cir. Oct. 2, 2020). As other courts have noted, the states did not create the virus or impose the pandemic's burden on voters—COVID-19 is not state

action that subjects otherwise-valid state laws to challenge.<sup>4</sup> At most, COVID-19 is now part of the “usual burden on voting” that arises “arising out of life’s vagaries,” and thus not a burden that renders a state law unconstitutional. *Crawford*, 553 U.S. at 197-98. And as this Court has noted, the Supreme Court has consistently deferred to state officials’ judgment in determining how best to manage COVID-19’s impact on voting and elections. *New Ga. Project*, No. 20-13360, slip op. at 8-9 & n.2 (11th Cir. Oct. 2, 2020).<sup>5</sup> Simply put, “the spread of the Virus has not given ‘unelected federal jud[ges]’ a roving commission to rewrite state election codes.” *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (citation omitted).

That is why many courts have recognized that ballot verification laws like Alabama’s do not impose an undue burden on the right to vote, including during the pandemic. *See Ziriaux*, 2020 WL 5569576, at \*18; *Thompson*, 959 F.3d at 810; *Democracy N.C.*, 2020 WL 4484063 at \*36; *Clark*, 2020 WL 3415376, at \*6-7; *Bostelmann*, 2020 WL 3619499, at \*2. In fact, the Supreme Court has previously stayed this district court’s

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<sup>4</sup> *See Thompson v. DeWine*, No. 20-3526, 2020 WL 5742621, at \*1 (6th Cir. Sep. 16, 2020); *Thompson*, 959 F.3d at 810; *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 405 (5th Cir. 2020); *id.* at 415-16 (Ho, J., concurring); *Clark v. Edwards*, No. 20CV283, 2020 WL 3415376, at \*10-11 (M.D. La. June 22, 2020); *Coalition for Good Governance v. Raffensperger*, No. 20CV1677, 2020 WL 2509092, at \*3 n.2. (N.D. Ga. May 14, 2020).

<sup>5</sup> Lower courts have followed suit, declining to alter election laws during this latest emergency. *See Ziriaux*, 2020 WL 5569576, at \*18; *Sinner v. Jaeger*, No. 20CV76, 2020 WL 3244143, at \*6 (D.N.D. June 15, 2020); *Williams v. DeSantis*, No. 20CV67, Doc. 12 (N.D. Fla. Mar. 17, 2020).

injunction on these same laws. *See Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049, at \*1 (U.S. July 2, 2020).

In so ruling, courts have noted that ballot verification laws can be followed safely while maintaining social distancing, mask wearing, and proper sanitation. Witnessing can be done by a friend, neighbor, postal worker, package or food delivery person, and can be done outdoors, wearing masks, and well-more than six feet apart. *See Ziriax*, 2020 WL 5569576, at \*6, 16; *Thompson*, 959 F.3d at 810; *Democracy N.C.*, 2020 WL 4484063 at \*27, \*33; *Bostelmann*, 2020 WL 3619499, at \*2; *cf. also Miller v. Thurston*, 967 F.3d 727, 739-40 (8th Cir. 2020). Voters who truly want to remain shut-in can have the witness observe through video chat or through a window, and then sign the ballot when it is passed underneath the front door or left outside in the mailbox. *Clark*, 2020 WL 3415376, at \*6. One court ruled plaintiffs did not even have standing to challenge a witness requirement, observing that a voter “can get a witness signature on her absentee ballot without violating [health] guidelines by taking the same precautions she takes when leaving her home for doctor’s appointments and other ‘limited purposes.’” *Id.* at \*6-11. And while the court below dismisses evidence that county libraries in Alabama offer safe, free, outdoor notarization of absentee ballots as “of no moment,” Op. 124, other courts have rightly found that the availability of such services reduces the burden on voters, *Ziriax*, 2020 WL 5569576, at \*16.

Voters do need to take some steps to comply with these laws, but these steps “are neither so serious nor so frequent as to raise any question about [] constitutionality”

and they “surely do[] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Cranford*, 553 U.S. at 197-98. Plaintiffs cannot claim they have lost the right to vote unless they show that voters are unable to comply with the law despite “tak[ing] reasonable steps and exert[ing] some effort”—failing that, “no one is ‘disenfranchised.’” *New Ga. Project*, No. 20-13360, slip op. at 6 (11th Cir. Oct. 2, 2020); *see also Ziriix*, 2020 WL 5569576, at \*17 (plaintiffs failed to submit evidence of “any voter who will be *unable* to vote during the pandemic,” so the “mere possibility” that certain subsets will face greater burdens does not justify “sweeping relief”) (emphasis added); *Frank v. Walker*, 819 F.3d 384, 386-87 (7th Cir. 2016). Here, verifying an absentee ballot is no greater burden than in-person voting in other years where voters have the time and expense of transporting themselves to their polling place in a timely manner, waiting in line, and showing ID to cast a ballot—including during flu season where there is “some risk” to voters, especially elderly or medically vulnerable ones.<sup>6</sup>

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<sup>6</sup> Curiously, the district court not only concluded that COVID-19 increased the burdens of ballot verification, but also decreased the state’s interests in combatting fraud, in an attempt to avoid this Court’s opinion in *Greater Birmingham Ministries v. Sec’y of State for Ala.*, 966 F.3d 1202, 1219-20 (11th Cir. 2020). *See Op.* 134-35. But the problem of fraud doesn’t disappear because of a pandemic; indeed, the increase in absentee voting only makes the state’s ballot security measures *more* weighty.

Ultimately, there is not burden on the right to vote here because, as this Court recently noted, there is no right to vote via absentee ballot and all voters retain the option to cast a ballot in-person. *See New Ga. Project*, No. 20-13360, slip op. at 5-6 (11th Cir. Oct. 2, 2020); *id.* at 16, 20 (Lagoa, J., concurring); *see also McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (the “claimed right to receive absentee ballots” is not “the right to vote”); *Cranford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment); *Mays v. LaRose*, 951 F.3d 775, 786, 792 (6th Cir. 2020); *Tex. Democratic Party*, 961 F.3d at 403-04; *Griffin*, 385 F.3d at 1130; *Tully v. Okeson*, No. 20CV1271, 2020 WL 4926439, at \*3-4 (S.D. Ind. Aug. 21, 2020); *cf. Burdick v. Tadishi*, 504 U.S. 428, 438-39 (1992) (burden of regulation small in light of alternative options to access electoral rights); *Cranford*, 553 U.S. at 197-99 (same); *Luft v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020) (burden must be assessed in light of “the state’s election code *as a whole*”). Accordingly, absentee ballot regulations, coupled with the remaining option to vote in-person, are categorically not an infringement of the right to vote.

## **II. Alabama’s election laws should not be suspended in the midst of the general election.**

Decisions like the one by the court below to change the rules during an election can “result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The Supreme Court “has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election,” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205,

1207 (2020), which avoids “serious disruption of [the] political process,” *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968). Here, “we are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed” early last month. *New Ga. Project*, No. 20-13360, slip op. at 9 (11th Cir. Oct. 2, 2020). “Staying the district court’s order here will prevent voter confusion, especially since [the state] has already mailed absentee ballots with instructions” regarding ballot verification. *Id.* at 10; *see also Ziriaux*, 2020 WL 5569576, at \*23.<sup>7</sup>

Confusion among voters is not the only risk. All sixty-seven counties in Alabama would still have to bear added time and expense in retraining thousands of election workers and volunteers on the new requirements for absentee ballots. The district court’s comments on whether retraining is easy in some counties, Op. 115, miss the point. Election workers are not idly waiting for assignments from federal courts; allocating time to court-required retraining is allocating time *away* from other needed election tasks. Courts should avoid adding such strain to an already-tense election year.

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<sup>7</sup> Even before COVID-19, the existence of an emergency does not give federal courts a license to engage in their own crisis management of election laws. *See, e.g., Bethea v. Deal*, 2016 WL 6123241, at \*2-3 (S.D. Ga. Oct. 19, 2016) (declining to change election laws during Hurricane Matthew); *ACORN v. Blanco*, No. 2:06CV611, Doc. 58 (E.D. La. Apr. 21, 2006) (declining to change election laws under the Voting Rights Act during Hurricane Katrina).

Now is not the time for courts to rewrite duly-enacted election laws. Over 300 cases have been filed flooding the courts in almost every state with demands to judicially alter election rules.<sup>8</sup> Election law has become so chaotic that it is now impossible for states to know in advance whether the election rules they have enacted will or will not be reimaged by federal courts. This ever-worsening reality is hardly what the Constitution envisions: “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .” U.S. CONST. art. I, § 4.

#### CONCLUSION

For the foregoing reasons, the Court should stay the injunction pending appeal.

Respectfully Submitted,

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<sup>8</sup> See Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker*, <https://healthyelections-case-tracker.stanford.edu/>.

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**CERTIFICATE OF COMPLIANCE**

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